The new HGB & COGSA

Do German carriers en route to the U.S. need to be on their guard?

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Germany & the U.S.

- In 2012, foreign maritime trade between the U.S. and Germany was almost 19 million metric tons. This was an increase of 40% since 2009.
- By weight, Germany was America's18th largest trading partner. But by value of the goods, Germany is 3rd, behind only China and Japan.

SOURCE: U.S. Dept. of Transportation

In Summary…

- Our article will be both
  - an English language source of information on the new German maritime rules as they apply to the carriage of goods and
  - an updated contrast of Germany's adaptation of the Hague/Visby Rules with America's unending desire to write its own rules.

The German Commercial Code

- Germany adopted the Maritime Law Reform Act (*Seerechtsreformgesetz*) in 2013, removing many century-old provisions and increasing conformity with treaty law.
  - Due to the age of the code, German maritime law was largely based on case law, whose findings were more malleable and opaque. The reform was adopted to orient the code to practical jurisprudence and so that actors would enjoy greater legal security through codification.

The German Commercial Code

- The Maritime Reform Act covers, *inter alia*, the carriage of goods, evidence rules, rights and duties of the captain, passenger rights, provisions about (electronic) bills of lading, way bills and even amended some company law.

The German Commercial Code

- The legal mechanism of the Maritime Reform Act is an amendment and update to Germany's Commercial Code *Handelsgesetzbuch* (HGB).
- As now amended, the new HGB more closely approximates the Hague/Visby Rules than the prior HGB.

Selected HGB Provisions

- Electronic Bills of Lading (§ 516.2)
- Sea waybills (§ 526.1)
- Shift of personal liability of the master as a quasi-merchant to treating master's liability closer to employee liability (§ 511, new; § 512, old).

§ 510: Standard of Care of Prudent Merchant

- **§ 500:** SL for carrier when leaving cargo above deck
- **§ 499:** Special damage cases
- **§ 509:** Sub-contracted carriers
- **§ 510:** Reporting damage
- **§ 477:** Shifting of liability

COGSA

- The U.S. Carriage of Goods by Sea Act (COGSA) was enacted in 1936 as the U.S. adoption of the Hague Rules, and since the U.S. has taken a different approach – choosing to regularly distance itself from international norms.
  - As a side note, the Hague Rules were in no small part based on the Harter Act – the American precursor to COGSA – and COGSA was America's adoption of the Hague Rules.

COGSA

- As a brief reminder of the conflicted and expansive nature of COGSA: "COGSA…governs carriage by sea to and from ports of the United States and its possession in foreign trade. That means that it can govern a case before an American court involving a shipment under a bill of lading that has been issued in a foreign country and that may incorporate a foreign national law and/or international convention not ratified by the United States, e.g. Hague/Visby Rules. Applying the U.S. COGSA to such situations violates normal conflict of laws practice, for the American court is then denying both the place where the contract was made and the substantive law acknowledged by both parties in their agreement."
  - *Chapter 3, United States Admiralty Law, Gerard J. Mangone*

A (very) Brief Illustration

Fact Pattern

Edso Exporting LP v. Atlantic Container Line, 2012 *U.S. App. Lexis* 5720 (2d. Cir. March 20, 2012).

- Edso contracted with Atlantic to ship a construction crane from Baltimore to Tripoli. During transit, the crane was damaged. The crane was shipped unpackaged and Edso did not declare any value for the crane in the bill of lading. The bill of lading and the tariff filed with the Federal Maritime Commission described the cargo as "1 crane."

- Of course, a lawsuit ensued. Both parties agreed that COGSA applied.

What is the result under COGSA?

- COGSA limits a carrier's liability for damage in connection with the transportation of goods to $500 per package, "or in case of goods not shipped in packages, **per customary freight unit**…unless the nature and value of such goods have ben declared by the shipper before shipment and inserted in the bill of lading."
- Atlantic argued that the crane itself was a "unit" and therefore the liability was limited to $500.
- Edso argued that the shipment was rated based on size and therefore the "customary" unit should be each cubic meter – resulting in liability of $61,000.

What is the result under COGSA?

- The District Court sided with Edso: $61,000. Why? Because the pricing was based on weight, the cubic meter was the "customary freight unit."
- The Court of Appeals, however, disagreed. The "customary freight unit" in COGSA is to be the actual freight unit used on the bill of lading **not** the industry standard unit of measure. The court considered the unit asserted on the B/L and the tariff filed with the Federal Maritime Commission. As such, in this case, we have "1 crane."

What is the result under COGSA?

- The bill of lading described "1 crane" to be shipped for $7,320 "as agreed."
- The tariff described the base freight rate as "$7,320 each."
- Because the B/L and the tariff were unambiguously describing "1 crane", the liability was limited to $500.

What about under the HGB?

- The HGB specifically states that the recovery for cargo damaged during transit is specified special drawing rights per weight (kg) of the damaged cargo. Transit by sea is 2 special drawing rights per KG. There is no maximum statutory liability, but privity of contract has priority.

- If the cargo is comprised of numerous parts and only an individual part are damaged, the calculation of the damage is based on the part that is lost if the cargo is still usable, **but** if the loss of the part means the loss of the whole then the whole cargo is the weight for the calculation.

What does the HGB say?

- What does the HGB then say about our crane example?
- If part of the crane were damaged, but the crane could be repaired and was not itself valueless following the damage, then the recovery against the carrier is limited to 2 special drawing rights per KG of the **broken** part of the crane.
- If the damage means that the crane is itself **entirely destroyed/worthless** then the recovery is simply the weight in kg of the crane multiplied by 2 special drawing rights.

So…the rest?

- Our comparison will be similar to George F. Chandler's *A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules*, Journal of Maritime Law and Commerce (1984), although we will be looking at sections of the HGB and COGSA that are both similar and dissimilar and being sure to include illustrative examples.
- Other highlights:
  - Legislative history of the Maritime Reform Act.
  - Electronic Bills of Lading
  - HGB changing captain's liability from quasi-merchant to an employee with managerial-style commercial proxy powers

Interested in the final paper?

- We will be presented the research in full – the full HGB updates contrasted with COGSA – in the 2014 Summer Semester at the Maritime College in Cuxhaven.
- The article will also be published (in English) in the *Zeitschrift für Deutsches und Amerikanisches Recht* (Journal for German and American Law)
- If you want an advanced copy of the article when it is finished, drop us an email

info@kravets.de